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"Making Up" with Law in Development

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Abstract

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"Making Up" with Law in Development

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THIS ARTICLE TAKES UP the enmeshment of framing and naming, what we understand as the work of representation, with the production of development knowledge. It addresses a central conundrum in the field: the relationship between development vision and development practice. Put at its most general, it concerns the connections between how the world looks to the practitioners of development and what development experts and institutions advocate as a result. Moving in the other direction, it considers how what experts and institutions do in the name of development changes the horizon, backdrop, and tasks of development itself. This inquiry takes as its point of entry two propositions. First, the intentional production of the new—whether it concerns capacities, institutions, events, or other phenomena—and the displacement of the old is in some basic way what development is "about." Second, in development, as elsewhere, institutional knowledge and practices of power are subjects that imply each other and, to be understood, must be investigated together.[1]

Here, I take up a five-part schema proposed by Ian Hacking, a Canadian philosopher of science and member of the Collège de France, to describe the process by which there comes to be a "[new] way to be a person."[2] Hacking's interest lies in how new types of persons come to materialize in the world as, following Friedrich Nietzsche, "[c]reating new names and assessments and apparent truths is enough to create new 'things.'"[3] The intuition pursued here is that Hacking's schema may shed light on the production of new subjects and identities well beyond those that he investigated, namely human persons. Turning the direction slightly, we may be able to put it to use to illuminate the process by which there comes to be a (new) way to be a nation state—a developing state. Indeed, its use may extend to the figures that populate development projects and policies; it may, for example, shed light on how there comes to be a new way to be a citizen or worker, or even a new way to be a woman or a family. For at the core of what Hacking calls "making up" are events, processes, and relationships that turn

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1. See Michel Foucault, *The History of Sexuality*, translated by Robert Hurley, vol 1 (Pantheon Books, 1978); Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978–1979*, translated by Graham Burchell (Palgrave Macmillan, 2008).

2. Ian Hacking, "Making Up People," 28 *London Review of Books* (17 August 2006), online: <www.lrb.co.uk/the-paper/v28/n16/ian-hacking/making-up-people> [Hacking, "Making Up People," *London Review*]. See also Ian Hacking, "Making Up People" in Thomas C Heller et al, eds, *Reconstructing Individualism: Autonomy, Individuality, and the Self in Western Thought* (Stanford University Press, 1986) 222 [Hacking, "Making Up People," *Reconstructing Individualism*].

3. Hacking, "Making Up People," *London Review, supra* note 2, citing Friedrich Nietzsche, *The Gay Science*, ed by Bernard Williams, translated by Josefine Nauckhoff (Cambridge University Press, 2001) at 70.

out to be central to the enterprise of development—namely, the construction of categories, the mobilization of figures, the exercise of disciplinary conventions, and the introduction of new institutional practices, all of which are aimed at the management of populations as well as the governance of states.

I propose that we consider Hacking's schema alongside James C. Scott's influential account of "seeing like a state."[4]

As Scott describes it, the modern state is animated by the impulse to make local practices legible to those at the centre, an endeavour that travels in tandem with a parallel project to create a uniform citizenship.[5] Achieving this legibility involves the imposition of standard measures and systems of accounting or registration on the diverse array of local variants to which state officials typically have neither knowledge nor access.[6] Legibility, whatever its benefits, comes at certain costs. The most immediate cost is the displacement of the diverse by the uniform, a process that entails a vast "reading out" of features and practices that are either irrelevant to or at odds with the centre's purposes. This inevitable simplification, in addition to generating unforeseen consequences that come back to haunt it,[7] paradoxically makes such administrative projects as much about *not* seeing as about seeing. And, as Scott observes, these projects of legibility and simplification serve a purpose: They are inevitably the prelude to some intervention or change, one that might well be resisted at the local level; indeed, exercises in remapping may have the secondary effect of remaking the local itself. It is not difficult to sense, then, why administrative maps of seeing and not seeing might become points of contestation: about what matters to know, about what is left in or left out, and about what can be done, by how much, and to whom. In the end, naming and mapping turn out to be inseparable from practice itself.

Taking Hacking's approach to the creation of human kinds into the field of development allows us to take up questions to which Scott's account is intimately related: how it is that states come to be seen as "developing" and, once imagined as either possessing (or lacking) certain attributes or capacities, become subject to "improving" interventions that induce or compel their governing elites to adopt particular orientations, engage in preferred activities, and pursue specific aims or ends.[8] This turns out to be one way to describe the enterprise of development.

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4.   *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press, 1998).

5.   *Ibid* at 32.

6.   *Ibid* at 24-32.

7.   *Ibid* at 21.

8.   Scott himself identifies the large development projects of the World Bank as instances of the high-modernist sensibility that is the ultimate target of his analysis (*ibid* at 342).

A focus on processes of "making up" highlights the central role played by imagination and design in the construction of development futures and the mobilization of development projects. But Hacking's schema may also help illuminate the ways in which the field is continuously renewed. One powerful engine of change is the constant reframing of development goals and problems, often accompanied by the identification of new pathologies to be addressed. Described in the most general terms, this is the emergence of new development objectives, challenges, or "realities" of various sorts, framed in novel languages and terms, some of which become hegemonic and even inescapable. Once entrenched, they combine with or supplant previous ways of seeing, describing, being, and acting until they, in turn, are displaced. Think of a diachronic process in which ideational and discursive developments, legitimated by specialized forms of expertise and enacted through institutional practices, change the conceptualization and engagement with development in fundamental ways.

Take the foundational discovery of the "poor," an event coterminous with the identification of "underdevelopment" and one that, over time, has led to the redescription of a wide swath of the geopolitical map as the Global South.[9] Or, consider the claim that the rule of law and good governance are essential to state legitimacy as well as development.[10] In addition to the designation of states as "failed" or illegitimate, it has fueled myriad projects to drive out "bad" governance through the institution of "best" or "global practice."[11] Or, consider the idea that development should be directed toward the fostering of human capabilities,[12] a proposition now routinely advanced by international institutions and manifested in the preoccupation with human capital.[13] Finally, consider the use of indicators, now ubiquitous within the field, to measure and rank progress on specific goals, to nudge or induce states to alter policy and practice

9.   See Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press, 2003) at 105-108. These interlinked events and their explication are major themes in Rajagopal's book.

10. See World Bank, *World Development Report 2000/2001: Attacking Poverty* (Oxford University Press, 2001) [World Bank, *World Development Report*]. For important parts of the intellectual scaffolding for this idea, see Amartya Sen, *Development as Freedom* (Oxford University Press, 1999).

11. See World Bank, "Governance" (2021), online: <www.worldbank.org/en/topic/governance>.

12. See "Markets, States, and Social Opportunity" in Sen, *supra* note 10, 111; Martha C Nussbaum, *Creating Capabilities: The Human Development Approach* (Belknap Press, 2011).

13. See World Bank, *World Development Report*, *supra* note 10; World Bank, "Human Capital Project" (2021), online: <www.worldbank.org/en/publication/human-capital>.

and, sometimes, to stand in for development itself.[14] Although all seem entirely normal, rather than timeless or inevitable ways to conceptualize development and manage its problems, they are postwar or even post-Cold War events, claims, and practices that, facing resolutely towards the future, ignore or repudiate aspects of the past. In remaking the yardsticks by which development progress is measured, all have transformed the horizon of possibilities for both populations and states.

The concern here is not the gap between the "real" problems of development and how they are represented. Rather, the focus is the fundamental structuring and operation of the field itself: the manner in which development issues and problems emerge and evolve, some of which were not previously recognized as relevant to development and some of which may not exist separate and apart from the work performed by development institutions and technocrats.

"Making up" is not an activity that is restricted to the field of development. Similar, even parallel, processes can be observed in other international endeavours. Indeed, common visions, figures, and images, along with a shared repertoire of policies and reform prescriptions, now circulate *among* international institutions. Thus, in addition to providing a means to reveal the structure and operation of development practice, tracing the mechanisms of "making up" may help us illuminate the lines of connection among international endeavours. In so doing, it may help us better see not only how projects move, merge, and consolidate across transnational space but also how, by diverging, fragmenting, and recombining, they might disappear or re-emerge and compete.

The last part of the article attempts to illustrate some of these possibilities by moving beyond the field of development to explore the use of Hacking's model in projects to promote gender equality. Here, as in the field of development, I contrast the mainstream discursive style with an alternative analysis attentive to the emergence of representative figures and their mobilization in and through practice. As is the case with development, advocates of gender equality rely heavily on claims about the demands of human rights and the rule of law. Because these, and other, projects are deeply infused with ideas about legal norms and institutions,

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14. See World Bank, "Human Capital Index and Components" (18 October 2018), online: <www.worldbank.org/en/data/interactive/2018/10/18/human-capital-index-and-components-2018>.

I attempt to trace some of the points at which the process that Hacking describes as "making up" intersects with the concept of legal consciousness.[15]

I.   MAKING UP PEOPLE

In an article in the *London Review of Books* entitled "Making Up People,"[16] Hacking describes the process by which new human conditions and identities emerge as clinical classifications. This piece includes a short, accessible crystallization of an extensive body of work in which Hacking connects the identification or creation of new "human kinds" to, *inter alia*, the emergence of an "avalanche of numbers," an inaugural—and transformative—event in the social sciences that he dates to about 1820.[17]

Hacking's general interest lies in what the identification of those new conditions and identities did or does to the people so labelled—put simply, how classification changes people's experience of themselves in the world and even produces categories of people that did not previously exist.[18] Using the example of multiple personalities, Hacking schematizes this process by setting down the actors, institutions, and processes involved in the generation and authorization of knowledge leading to these new classifications.

Hacking's account contrasts two ways of describing this process. The first is conventional, in the sense that it sets the frame for normal discussion; both enthusiasts and skeptics use it: "A. There were no multiple personalities in 1955; there were many in 1985."[19] The second, alternative, approach goes like this:

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15.   The term "legal consciousness" aims to capture the language, categories, and terms of engagement accepted as authoritative and used by the professionals within legal cultures at particular moments in time. See "Legal Consciousness" in Duncan Kennedy, *The Rise and Fall of Classical Legal Thought* (Beard Books, 2006) 1 [Kennedy, *The Rise and Fall*]; Duncan Kennedy, "Three Globalizations of Law and Legal Thought: 1850–2000" in David M Trubek & Alvaro Santos, eds, *The New Law and Economic Development: A Critical Appraisal* (Cambridge University Press, 2006) 19 [Kennedy, "Three Globalizations of Law"].

16.   *Supra* note 2.

17.   Hacking, "Making Up People," *Reconstructing Individualism*, *supra* note 2 at 222. For further discussion, see also Ian Hacking, *The Taming of Chance* (Cambridge University Press, 1990) [Hacking, *The Taming of Chance*]; Ian Hacking, *Rewriting the Soul: Multiple Personality and the Sciences of Memory* (Princeton University Press, 1995) [Hacking, *Rewriting the Soul*].

18.   For a detailed exploration of this process, see Ian Hacking, "The looping effects of human kinds" in Dan Sperber, David Premack & Ann James Premack, eds, *Causal Cognition: A Multidisciplinary Debate* (Oxford University Press, 1995) 351 [Hacking, "Looping effects"].

19.   Hacking, "Making Up People," *London Review of Books*, *supra* note 2.

> B. In 1955 this was not a way to be a person, people did not experience themselves in this way, they did not interact with their friends, their families, their employers, their counsellors, in this way; but in 1985 this *was* a way to be a person, to experience oneself, to live in society.[20]

Hacking is not interested in the conventional debates that tend to be provoked under mode A: for example, whether we can ascertain if multiple personalities "really exist" and, if so, what defines the traits and characteristics with which they are associated; how the condition might be addressed or remedied; et cetera. Instead, he is preoccupied with mode B inquiries: how the identification of multiple personalities comes about; how the condition is distinguished from other ways of being in the world; what events the emergence of this new category might be connected to; what actors are involved in its arrival on stage; what they did to draw attention to and gain acceptance of this new "reality" of personhood; why, at one moment, a condition might be entirely unrecognized or explained in one way, yet later it is accounted for in completely different terms; et cetera.

Notice that in mode A, multiple personalities are both reified and isolated. Approached as something "out there" in the world and considered from this (external) vantage point, their existence becomes a matter of objective truth, subject to verification by ordinary scientific methods. In mode B, by contrast, multiple personalities are conceptualized in a completely different way: as a way of being in the world or as a mode of existence. As phenomena as opposed to "fact," multiple personalities have both history and context. This makes their appearance contingent; they might, for example, prove to be transitory, to be displaced, or to be superseded by the appearance of some new condition. Multiple personalities are also fundamentally relational, as they stand in direct contrast with—and arguably make sense only relative to—an idea about what constitutes the normal human condition, a fully integrated human personality. Rather than be subject to simple verification of the "yes that is true" or "no that is not" kind, then, the recognition and appreciation of multiple personalities might change as our understanding of the normal shifts.

One of Hacking's key insights is that the emergence of the new classification changes the horizon of possibility for everyone.[21] As he observes, it is only possible to be a (certain) person "at a certain time, in a certain place, in a certain social setting."[22] Thus, identities are both relational and historical; they emerge not

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20.   *Ibid* [emphasis added].
21.   Hacking, "Making Up People," *Reconstructing Individualism*, *supra* note 2 at 233.
22.   *Ibid*.

"on their own" but as a consequence of interactions with others and under the influence of particular social processes or disciplinary practices.

Whether envisioned as an effect of some general change in the context or ecosystem out of which they emerge or as a newly (inter)constituted form of identity, in mode B, we are called to study multiple personalities not as discrete phenomena, things in themselves, but as part and product of the structures and systems in which they are embedded. In the end, what they "are" turns out to be inseparable from the modes of inquiry through which we recognize them.[23]

This brings us to development. While, as is the case with people,[24] there may be no generalizable template for "making up" states, the warrant for trying on Hacking's schema in the context of development comes from the presence of some inviting parallels.

First, the significance of the category itself. Development is now a sufficiently operative classification that it has altered how states and populations are imagined and how they relate in the international order.[25] We might even say that the designation has inflected the condition of "stateness" itself. For some purposes, and as against the standard Westphalian imaginary, states are not simply "sovereign" and "equal": They are either "developed" or "developing."[26]

Second, the idea of development, along with the classification of states in relation to its stages, is a recent project, something that emerged at a particular moment in time and in a particular geopolitical context.[27] While changes in that context partly account for its trajectory, the field has been deeply marked by shifting disciplinary norms, preoccupations, and practices. Indeed, a focus on

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23. As Hacking put it, "Method and reality do not fit by good fortune or preestablished harmony. Each defines the other.…The connection between 'the way the world is' and 'how we find out about it' is one of identity of organic structure [*sic*]." See Hacking, *The Taming of Chance*, *supra* note 17 at 213.

24. Hacking observes, "I see no reason to suppose that we shall ever tell two identical stories of two different instances of making up people." See "Making Up People," *Reconstructing Individualism*, *supra* note 2 at 236.

25. See Rajagopal, *supra* note 9; Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (Cambridge University Press, 2011); Gustavo Esteva, "Development" in Wolfgang Sachs, ed, *The Development Dictionary: a guide to knowledge and power* (Zed Books, 1992) 6 (referring to a speech by President Harry Truman: "On that day, two billion people became underdeveloped." See *ibid* at 7).

26. The claim is not, of course, that states are, or were, otherwise treated as equal in the international order. For the classic analysis of this question, see Gerry Simpson, *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (Cambridge University Press, 2004).

27. See Antony Anghie, "Time Present and Time Past: Globalization, International Financial Institutions, and the Third World" (2000) 32 NYUJ Intl L & Pol 243.

the emergence of new paradigms within "core" development disciplines, such as economics, is one way to track ruptures and transformations in the field that elude explanation on grounds of politics or interest alone.

Third, as with people, the classification typically signals the onset of action or intervention.[28] Developing states are understood to be in need of not only financial assistance but also tutelage and even external governance; hence the ubiquitous "conditionalities" attached to the loans disbursed by Bretton Woods Institutions to indebted states.[29] Those that are "developed," by contrast, may be called on to assist in the provision of material resources or professional expertise.

A product of the latter half of the twentieth century, development was enabled by a confluence of events, from the "end" of colonialism and the repositioning of the metropolitan powers and their peripheral territories as formally equal juridical entities within the international order, to the recognition that poverty and macroeconomic instability at the domestic level could spill over borders and upend the quintessential task of international law: the maintenance of peace and security. These events helped give rise to a reconstituted international order in the postwar era, one that included the construction of new institutions consecrated to finance and development such as the International Bank for Reconstruction and Development (the World Bank) and the International Monetary Fund.[30] Populated with professionals employing specialized forms of expertise, these institutions constructed and, over time, radically transformed many of the core ideas and practices that have shaped the field of development. Although postwar development policy and practice were originally animated by a vision of national economic growth based on import substitution industrialization, after the end of the Cold War, the international financial institutions repudiated this path in favour of market-centered models of economic growth.[31] At the same time, development

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28. See Hacking, "Making Up People," *Reconstructing Individualism*, *supra* note 2 at 226. Hacking writes, "Is making up people intimately linked to control? Is making up people itself of recent origin? The answer to both questions might conceivably be yes" (*ibid*).

29. For one discussion of conditionalities and their uses, see Franz Christian Ebert, "International financial institutions' approaches to labour law: The Case of the International Monetary Fund" in Adelle Blackett & Anne Trebilcock, eds, *Research Handbook on Transnational Labour Law* (Edward Elgar, 2015) 124 at 126-27.

30. For an illuminating history of both the colonial origins of development and the prewar move to institutions, see Antony Anghie, "Colonialism and the Birth of International Institutions: Sovereignty, Economy, and the Mandate System of the League of Nations" (2002) 34 NYUJ Intl L & Pol 513.

31. For one discussion of the contestation around this shift within the World Bank, see Robert Wade, "Japan, the World Bank, and the Art of Paradigm Maintenance: The East Asian Miracle in Political Perspective" (1996) 217 New Left Rev 3.

practice became more and more closely tethered to parallel international projects to advance liberalized trade and global market integration. In this convergence, area studies, analyses of political economy, and attention to national economic history in development policy gave way to the application of general theories from microeconomics and new public management.[32] As ideologies like the "end of history" began to infuse development thinking, goals such as the transition to market-centred democracy were explicitly incorporated into the powers of new development finance agencies,[33] while established institutions began to engage in a range of novel practices to influence the governance of developing states.[34] Soon after extensive popular resistance provoked by these practices, development institutions began to attend to the "social" dimension of development.[35] All of this activity fueled a massive expansion of the ambitions of development institutions; one result, previously unthinkable, was the construction and diffusion of global good governance norms for an "enabling business environment" for economic growth.[36]

Yet it is the field's most characteristic feature now that brings development within the ambit of Hacking's analysis. Just as with the emergence of new human conditions and kinds, development practice has become deeply enmeshed with the generation of data, unthinkable and perhaps unworkable outside of the aggregations of numbers that propel it forward. Devised with the express aim of (re)shaping norms and guiding public and private action, metrics and

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32.   For a general introduction and discussion of these issues, see Joseph E Stiglitz and Narcis Serra, eds, *The Washington Consensus Reconsidered: Towards a New Global Governance* (Oxford University Press, 2008).

33.   See *e.g.* European Bank for Reconstruction and Development, "Agreement Establishing the European Bank for Reconstruction and Development" (30 September 2013), online: <www.ebrd.com/news/publications/institutional-documents/basic-documents-of-the-ebrd.html>.

34.   For a discussion, see Ibrahim FI Shihata, "Issues of 'Governance' in Borrowing Members – The Extent of their Relevance Under the Bank's Articles of Agreement" in *The World Bank Legal Papers* (Martinus Nijhoff, 2000) 245.

35.   For a description of these events, see Kerry Rittich, "The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social" in Trubek & Santos, *supra* note 15, 203 [Rittich, "Second-Generation Reforms"].

36.   Shihata, *supra* note 34 at 253.

indicators have become normalized tools in the development arsenal.[37] With the routinization of their use, development is increasingly conceptualized in ordinal terms: What matters is performance, ranked vis-à-vis other states and measured against a floating set of development benchmarks. Thus, what "counts" is not simply progress per se, but rather status and position, as determined by metrics and practices that are established within development institutions. Insofar as counting, valuing, and ranking constitute the preferred approach to development problem solving, the central innovation here is that data and measurement are not simply development tools. Rather, in some instances, they have become development proxies. That is, data are not generated simply for the purposes of preparing the ground for development projects or assessing the end state or outcome of development interventions. Rather, the production of data and numbers is *itself* a central development activity, evidence of the very processes that it purports to serve or advance.

Although hundreds, if not thousands, of indicator sets have been crafted at this point, the World Bank's flagship *Doing Business* indicators provide perhaps the most famous illustration of the uses to which data are now routinely put.[38] Designed to induce or "nudge" states to alter the rules and institutions that structure the conduct of investment, production, and exchange—thereby facilitating their integration into global markets and, it is claimed, generating better development outcomes—these indicators measure improvements (and declines) in national business climates year over year, ostensibly on the basis of regulatory best practice. The norms and theoretical frameworks underlying these indicators are neither unique nor self-generated; their genealogies can be traced both backwards in time and outward to other institutional and intellectual

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37. See Sally Engle Merry, "Measuring the World: Indicators, Human Rights, and Global Governance" (2011) 52 Current Anthropology 83; Kerry Rittich, "Governing by Measuring: The Millennium Development Goals in Global Governance" [Rittich, "Governing by Measuring"] in Ruth Buchanan & Peer Zumbansen, eds, *Law in Transition: Human Rights, Development and Transitional Justice* (Hart, 2014) 165; Ruth Buchanan, Kimberly Byers & Kristina Mansveld, "'What Gets Measured Gets Done': Exploring the Social Construction of Globalized Knowledge for Development" in Moshe Hirsch & Andrew Lang, eds, *Research Handbook on the Sociology of International Law* (Edward Elgar, 2018) 101.

38. See World Bank, *Doing Business 2020: Comparing Business Regulation in 190 Economies* (24 October 2019), online (pdf): <openknowledge.worldbank.org/bitstream/handle/10986/32436/9781464814402.pdf> [World Bank, *Doing Business*]. For a description of the project, see World Bank, "Doing Business: Measuring Business Regulations" (2020), online: <www.doingbusiness.org/en/doingbusiness>.

projects.[39] However, the best practices actually deployed in the *Doing Business* project, as well as the criteria by which states are positioned in respect of those practices, are in-house productions, constructed by World Bank experts on the basis of their own information gathering, measurement, and assessment practices. External experts are invited to contribute their views about particular regimes, albeit within parameters established by the institution; national rankings are then determined via internally determined institutional practices.[40] The resulting indicators work their magic via the medium of publicity, as states are induced to improve their position vis-à-vis their peers through a process of competitive comparison, while private actors use the rankings to assess the relative desirability of jurisdictions for investment purposes. As has been well noted, these indicators, like others, function as classic tools of governance.[41] But insofar as they purport to reliably encode, commensurate, and convey the state of something that might be called "good business governance," they also create something entirely novel. Thus, they provide a textbook illustration or instance of Hacking's observation that some things do not exist before they are counted.

The productive effects of indicators are now visible in a wide range of endeavours associated with development as well, from the eradication of forced labour to the promotion of gender equality. For example, in the face of intractable difficulties, both practical and conceptual, in operationalizing the legal definition of trafficking under the United Nations' *Protocol to Prevent, Suppress and Punish*

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39.   For discussions of the intellectual and institutional genealogy of the ideas within international economic law on which these metrics are built, see *e.g.* Anne Orford, "Theorizing Free Trade" in Anne Orford & Florian Hoffmann, eds, *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016) 701; Kerry Rittich, *Recharacterizing Restructuring: Law, Distribution and Gender in Market Reform* (Kluwer Law International, 2002).

40.   For a description of how these indicators are constructed and how they work in the context of labour market governance, see Alvaro Santos, "Labor Flexibility, Legal Reform, and Economic Development" (2009) 50 Va J Intl L 43.

41.   Kevin Davis et al, eds, *Governance By Indicators: Global Power Through Quantification and Rankings* (Oxford University Press, 2012); Rittich, "Governing By Measuring", *supra* note 37.

Trafficking in Persons,[42] the International Labour Organization, over a series of studies, developed indicators to give trafficking and forced labour greater materiality, visibility, and legibility.[43] The underlying theory was that the key to combatting such phenomena lies in data.[44] The indicators were aimed at addressing a fundamental problem: the difficulty of conclusively identifying those who have been trafficked while differentiating them from migrant workers and others engaged in related forms of work. That problem was addressed, and, at the same time, the materiality of trafficking effectively produced, through indicators representing the apparent size and shape of the populations of persons trafficked as well as the dollar value of their labour.[45]

The construction of these indicators involved contentious, arguably arbitrary, determinations about matters like what constitutes "strong" or "weak" labour coercion and the appropriate mode of valuing different forms of labour for the purposes of assessing the presence or absence of exploitation.[46] Because they involve determinations about some of the very matters that elude resolution or consensus in debates about the legal definition of trafficking,[47] indicators play a foundational role in consolidating the picture of trafficking and perceptions of its scope and depth. One conclusion that we might draw is that trafficking remains elusive and difficult to recognize apart from these exercises in representation and commensuration. Yet another possibility is that trafficking may not exist, at least

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42. *Protocol to Prevent, Supress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, GA Res 55/25, UNGAOR, 55th Sess, UN Doc A/Res/55/25 (2000) 31, online: <digitallibrary.un.org/record/427192>. Article 3 of the Protocol defines trafficking as,

> the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs (*ibid*, art 3(a)).

43. See International Labour Office, *Hard to See, Harder to Count: Survey Guidelines to Estimate Forced Labour of Children and Adults* (ILO, June 2012).

44. *Ibid*.

45. See International Labour Office, *Profits and Poverty: The Economics of Forced Labour* (ILO, May 2014).

46. *Ibid*.

47. This example and analysis are drawn from Kerry Rittich. See "Representing, Counting, Valuing: Managing Definitional Uncertainty in the Law of Trafficking" in Prabha Kotiswaran, ed, *Revisiting the Law and Governance of Trafficking, Forced Labor and Modern Slavery* (Cambridge University Press, 2017) 238.

in its present global incarnation, separate and apart from institutional practices that both highlight common elements in what otherwise appear to be quite disparate labour and migration situations and, at the same time, distinguish those situations from others to which, viewed through a different lens, they might seem clearly connected.[48] Put at its simplest, the frame is doing a huge amount of work both in the production of the paradigmatic victims of trafficking and in the identification of those victims in contested contexts. Yet in all of this, and in spite of the reliance on data, trafficking still paradoxically emerges less as a hard fact than as a phenomenon of its visualization.[49]

As important as they are to questions of substance and content, metrics and indicators perform a shift at the level of form as well, by decentering the discursive and explanatory dimension and highlighting the visual and symbolic in accounts of development tasks and trajectories. While graphs and charts have long had an established place in the documentation of development predicaments and outcomes, their growing salience in reports and analyses suggests that they now play a more significant role. Instead of merely illustrating facts or conclusions confirmed or explained elsewhere, indicators now literally "make" the point on their own.

In all of this, the highly productive nature of development itself, along with its component operations and classifications, comes sharply into view. We can see that development has both emerged from, and has itself generated, new relationships and practices of engagement, negotiation, domination, and resistance in the international order—on the part of states, international institutions, populations, and the many hybrid entities that now exist among them.

II. MAKING UP DEVELOPMENT

To bring this home to the topic at hand, for "multiple personalities" and "people" I will substitute into Hacking's schema the terms "development" and "states." Before proceeding, however, an important caveat: Hacking's schema provides a template for reflecting on the production of mainstream development knowledge. Although it has a long and distinguished pedigree and is itself a critically important part of the field, dissident development knowledge and its relation to mainstream knowledge is touched on here only incidentally, to be explored more fully at another moment.

Here is how the process ordinarily goes, according to Hacking. It has five stages.

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48.   *Ibid* at 246.
49.   *Ibid* at 260.

We have the (1) *classification* as either underdeveloped or developing, conducted in the first instance by reference to economic criteria. Originally described as a state of economic backwardness or a failure to achieve the benefits of modernization,[50] the underlying concept has been progressively modified and expanded since the end of the Cold War. For example, development now normally includes adherence to good governance norms and conformity with the rule of law; the pursuit of "social, structural and human" dimensions of development,[51] to be addressed through endeavours such as the fostering of human capital and capabilities[52] or the promotion of gender equality; and social progress, as measured by targets and indicators established in the Millennium Development Goals (MDGs) or the Sustainable Development Goals (SDGs).[53]

We have the (2) *states* classified as "developing," which are associated with a primitive or disordered condition relative to their peers, and who are subject to scrutiny and interventions.[54] Although the term "uncivilized" is no longer in favour, they may nonetheless be referred to as "failed" states.[55] Yet even in the absence of such explicit judgments, the incorporation of good governance norms and the reliance on canonical markers of social and institutional progress mean that developing states are still described in ways that sound in the register of morals and civilization. For example, states may fail to qualify as developed because they deviate from norms of liberal democratic governance or do not respect the equality of women. Or, they fail to implement the basic institutions of market economies or to adequately respect and enforce property and contract rights, et cetera.

There are the (3) *institutions*, beginning with the official regional and international banks, such as the Bretton Woods institutions and the African

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50. See generally WW Rostow, *The Stages of Economic Growth: A Non-Communist Manifesto* (Cambridge University Press, 1960).

51. Rittich, "Second-Generation Reforms," *supra* note 35 at 203-04.

52. See Sen, *supra* note 10 at 292-97; Nussbaum, *supra* note 12; Rittich, "Second-Generation Reforms," *supra* note 35.

53. See *Transforming Our World: The 2030 Agenda for Sustainable Development*, GA Res 70/1, UNGAOR, 70th Sess, Supp no 49, UN Doc A/Res/70/1 (2015), online: <digitallibrary.un.org/record/3923923>.

54. The term "developing" has been repeatedly challenged in critical development literature, for example through terms such as "underdevelopment." See *e.g.* Gustavo Esteva & Madhu Suri Prakash, *Grassroots Post-Modernism: Remaking the Soil of Cultures* (Zed Books, 1988) at 119; Walter Rodney, *How Europe Underdeveloped Africa* (Howard University Press, 1981) at 14.

55. See *e.g.* Daron Acemoglu & James A Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (Crown Business, 2012).

Development Bank, that design, fund, and conduct development interventions. The list of relevant institutions would expand considerably if we also included the major civil society organizations that are now involved in development as well as the foundations, such as the Ford Foundation and the Soros Foundation, that finance their work. On their own and in conjunction with public institutions, these organizations do everything from the direct provision of services to the promulgation of development policy, and some monitor the activities of official development institutions as well.

In addition to classifying states, these institutions, along with the states and participating civil society actors, hold meetings and convene local, regional, and world conferences. They build websites and hold press conferences. They announce initiatives such as the MDGs and SDGs and promote standards like the Calvert and Equator Principles.[56] They run training programs for development aid workers to promote goals such as democracy, gender equality, and the reduction of violence against women. Indeed, they run programs on how to do trainings on these same issues. They develop indices for counting and ranking, from the United Nations Development Programme's Human Development Index[57] (one of the first) to the World Bank's *Doing Business* indicators[58] (one of the most influential) and Human Capital Index[59] (one of the most recent).

All of this activity either leads to or directly produces the (4) *knowledge*. Development knowledge includes the official outcomes of intergovernmental events, such as Declarations, Platforms for Action, and Principles, along with the myriad policy papers, global reports, and annual and special reports, and the array of indices and metrics that institutions now routinely generate. Notice the overlap between institutional knowledge and practice here. Development knowledge of this type should be understood not as "justified true belief,"[60] but rather as conjectural knowledge in the mode of Karl R. Popper.[61] As Hacking explains, this knowledge concerns "the presumptions that are taught, disseminated and refined within the context of the institutions" concerning "basic facts."[62]

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56. "The Equator Principles" (2020), online: <equator-principles.com>; Calvert Research & Management, "The Calvert Principles for Responsible Investing" (2021), online (pdf): <www.calvert.com/media/public/34498.pdf>.

57. (last visited 8 July 2021), online: <hdr.undp.org/en/content/human-development-index-hdi>.

58. *Supra* note 38.

59. (10 October 2018), online: <datacatalog.worldbank.org/dataset/human-capital-index>.

60. Hacking, "Making Up People," *London Review of Books*, *supra* note 2.

61. "Conjectural Knowledge: My Solution of the Problem of Induction" (1971) 25 Revue Internationale de Philosophie 167.

62. Hacking, "Making Up People," *London Review of Books*, *supra* note 2.

Put simply, development knowledge is institutionally generated and institutionally specific. The claims and assumptions on which development projects are based need not reach the standard of falsifiability; that is, they do not rest upon facts determined in any empirically verifiable sense. Development knowledge may instead be a theoretical assumption or simply a working hypothesis, which is then "supported" by data that are either selected or specifically generated because of their pertinence to the hypothesis at hand. Or it may reflect a negotiated compromise among positions emerging from the back and forth among the parties involved. Belief as such in the validity of these assumptions, hypotheses, and statements on the part of the actors, moreover, is neither required nor even necessarily relevant; instead, all that matters is sufficient acceptance that institutional projects can proceed.[63] The resulting knowledge attains provisional dominance until it, in turn, is modified or displaced by other development truths.[64] This new knowledge is sometimes created in reaction to established knowledge, for example, where critique has been absorbed within mainstream institutions.[65]

Out of expert knowledge comes popular knowledge—the knowledge taken up and circulated by the interested public. For example, thanks to the widespread publicization of the MDGs, there was a time when "everyone knew"—that is, you would encounter statements to this effect everywhere—that the main task of development was to halve the number of people living on a dollar a day.[66]

This knowledge is produced and validated by the (5) *experts*, those designated as such or whose status is confirmed by their engagement with the major development institutions, for example, as consultants or participants in their projects and activities. In addition to institutional staff like economists,

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63. See Andrew Lang, *World Trade Law after Neoliberalism: Reimagining the Global Economic Order* (Oxford University Press, 2011) at 7 [Lang, *World Trade Law*]. This is akin to the "as if" knowledge described by Lang that grounds the practice of adjudication within the WTO.

64. Among the recent candidates are the lack of development caused by bad governance or the resource curse. See Shihata, *supra* note 34; Andrew Rosser, "The political economy of the resource curse: a literature survey" (2006) Institute of Development Studies Working Paper No 268, online: <opendocs.ids.ac.uk/opendocs/handle/20.500.12413/4061>.

65. See Kerry Rittich, "Theorizing International Law and Development" in Anne Orford & Florian Hoffman, eds, *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016) 820 [Rittich, "Theorizing International Law and Development"].

66. Similar claims are now attached to the successor project, the Sustainable Development Goals (SDGs), although the target number by which the poor are identified has been revised upward and now stands at $1.25 a day. Global Impact, "Sustainable Development Goals" (last visited 8 July 2021), online: *Global Impact* <sdgfunds.charity.org/?gclid=EAIaIQobChM IuMGUh5nN6AIViv7jBx1NnANYEAAYAiAAEgK9nvD_BwE>.

statisticians, and gender experts, think of those invited to aid in the construction of indices, those whose work is cited in the bibliographies of major reports, et cetera.

Finally, as Hacking notes, the whole process can be spun in reverse: There are the (5) experts or professionals who generate the (4) knowledge, judge its validity, and use it in their practices. They work within (3) institutions that guarantee the legitimacy and authenticity of their status as experts. They study, try to help, or advise on the control of the (2) states, who are then (1) classified according to established criteria as either developing or underdeveloped.

Notice the bidirectionality of the movement from classification to expertise—Hacking observes two vectors, top-down and bottom-up—involved in the process of "making up." It is the classification, undergirded by specialized knowledge, that produces the states or people that we understand to require developing. The knowledge through which that designation is made both grounds and flows from institutional practice.[67] At the same time, in the execution of their professional roles, development experts are both identifying and constructing the deficits and problems to be addressed and continually (re)conceptualizing the very condition toward which states must (re)orient themselves.[68]

As with people, the creation of states now designated as "developing" is normally a prelude to intervention or control.[69] Yet once conjured up, the category can be mobilized in the service of a variety of projects. Indeed, following the lines laid down by Hacking, we can contemplate the possibility that the process of classification might even work in the opposite direction. That is, states might be designated as "developing" precisely *because* they lack some attribute that advances, or possess some characteristic that impedes, some (other) international objective or project. Still, as Hacking notes, this is a dynamic process: The "named" interact with the "names" that they are given.[70] The generativity of the process is perhaps best revealed by the resistance with which development interventions are routinely met; it can be quite fundamental in nature, and it occurs at the levels of both populations and states.

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67. See Lang, *supra* note 63.
68. For a discussion of the different ways that the aims and possibilities of development are conceptualized within the sub-disciplines of law, see Rittich, "Theorizing International Law and Development," *supra* note 65.
69. As Hacking observed, "[h]uman kinds are formulated in the hope of immediate or future interventions in the lives of individual human beings. If we change the background conditions we can improve the person, if only we can understand what kind of person we are dealing with." See "Looping effects," *supra* note 18 at 351.
70. Hacking, "Making Up People," *London Review of Books*, *supra* note 2.

People object in a range of ways to being classed as mere targets for assistance and poverty alleviation, defined by what they do not have or cannot do.[71] They may insist on their political agency or even their subjectivity as artists.[72] They are alert to the ways in which "poverty alleviation" may be a means to contain their resistance or a cover for geopolitical aims, rather than simply a means to ameliorate social and economic disadvantage.[73] They routinely resist specific development projects and sometimes processes of modernization *tout court*, especially where they lead to fundamental disruptions to local economic practices or modes of subsistence.[74] At the same time, taking up the possibilities proffered by development interventions and finding ways to interrupt them or turn them in new directions, people constantly reposition and remake themselves as development subjects.

States, for their part, may challenge development narratives or interventions designed to "assist" them, invoking international norms such as democracy, self-determination, or human rights in support. Consider, for example, state responses to the loan conditions attached to the structural adjustment programs of the 1990s and to the more recent (and strikingly parallel) conditions attached to the financial bailouts of the peripheral states in Europe, such as Greece, by the IMF, the European Central Bank, and the European Union in the wake of the global financial crisis.[75] Indeed, states may challenge their subordinate status entirely, calling into question the fundamentals of the international order, through calls for a "new international economic order" and "the right to development."[76]

All of this engagement, negotiation, and resistance feeds back into development practice, sometimes altering the direction or naming of projects or

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71. See *e.g.* the range of activities undertaken by "the poor," described in Abhijit V Banerjee & Esther Duflo, *Poor Economics: A Radical Rethinking of the Way to Fight Global Poverty* (Public Affairs, 2011).

72. See Richa Nagar, *Hungry Translations: Relearning the World Through Radical Vulnerability* (University of Illinois Press, 2019).

73. Rajagopal, *supra* note 9 at 18.

74. For an account of the popular resistance to the damming of the Narmada River in India, see Arundhati Roy, *Power Politics* (South End Press, 2001) at 35-86.

75. For one account, see Yanis Varoufakis, *Adults in the Room: My Battle with the European and American Deep Establishment* (Farrar, Straus and Giroux, 2017).

76. See Nils Gilman, "The New International Economic Order: A Reintroduction" (2015) 6 Humanity J 1 at 2.

catalyzing the creation of new categories and institutions.[77] Whatever the effects of specific interventions and the responses they provoke, institutional practices and priorities do independent work, changing the economic and political landscapes into which states are inserted, and altering the horizon of possibility for their populations. Throughout, we can see development experts continually remaking the very fabric of the orders in which they operate and in which states are "developing."

A word about modes A and B as frames for seeing development: The field of development is notoriously rife with controversy, about its aims and origins and about where projects go awry and for what reasons.[78] Equally intractable differences pervade debates around law and development, as (sub)disciplinary and methodological commitments set divergent parameters for examining the field's most basic question: law's relation to development. Scholars and policy makers alike may take international law, economic and financial regulation, or human rights as their starting point; their analytic touchstone may be economic, critical, constructivist, or Kantian theory. From these divergent starting points, intellectual and ideological positions may then be translated or converted into a wide range of institutional practices.[79]

Differences on this level are not susceptible to resolution. Positions are not "right" or "wrong," nor are the gaps between them easily bridged. Rather than productive discussion, engagement tends to lead, as Hacking observes, to "heated…pointless debates,"[80] argumentative dead ends, or what might even be called religious wars. For as with new identities, development raises foundational questions about knowledge, engages assumptions about what motivates and moves individuals and societies, and, by extension, implicates political and ideological commitments as well.

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77.   The World Bank Inspection Panel, described as "an independent complaints mechanism for people and communities who believe that they have been, or are likely to be, adversely affected by a World Bank-funded project," is one such example. See World Bank, "The Inspection Panel" (2021), online: <www.inspectionpanel.org>.

78.   For a recent effort to disrupt mainstream assumptions about development, see Banerjee & Duflo, *supra* note 71.

79.   See Rittich, "Theorizing International Law and Development," *supra* note 65. On the (claimed) superiority of common law over civil law systems when it comes to generating economic growth, see Rafael La Porta, Florencio Lopez-de-Silanes & Andrei Shleifer, "The Economic Consequences of Legal Origins" (2008) 46 J Econ Lit 285. This claim, in turn, provided the analytic foundation for the construction of the Doing Business indicators on business regulation. See *supra* note 38 at 325.

80.   Hacking, "Making Up People," *London Review of Books*, *supra* note 2.

While Hacking rightly describes it as the normal mode of inquiry, mode A sharply reduces the number of questions that matter—and that are available to ask—about development. Like multiple personalities, developing states appear at certain moments, but we do not consider how or why. We do not ask what preceded them or why they turn up now, when before we did not notice them at all. We do not ask why we worry about certain questions and why those questions change: why, for example, we recognize now that law and governance are central to development, when before such matters were off limits entirely.[81] With such inquiries already foreclosed, we are simply invited to take development and its predicaments as presented. In all of this, we leave aside the possibility that development practices, rather than the child or handmaiden of development goals and knowledge, may instead be their origin or source.

By contrast, under mode B, we do not attempt to resolve or even address the issues at stake. Questions of the essence or nature of development are bracketed, as are debates about the path to its achievement. Sidestepping debates around ontology and causation, however, Hacking's schema opens the terrain in other ways. Focusing on the dissemination of practices and authoritative knowledge by development organizations, their uptake and modification on the part of the state, and the inculcation of new forms of behaviour, by institutional actors and the population at large, it provides a route to follow the itinerary of development, a way to trace and periodize its preoccupations and activities. As the focus on the stated goals of development is displaced, our attention is directed instead to the specific targets of interest and the mechanics by which they are furthered. For example, where did the idea of development come from? To what other events is its emergence connected? How did people come to imagine that states might be in the condition of underdevelopment? By what techniques was it identified? Who thought that it mattered, and why? Why were their views influential? Were there others who had different experiences or alternative accounts of the condition of underdevelopment and its sources? What happened to *their* accounts? And why does the field look so different now than it did forty years ago?

Without taking a position in the religious wars—that is, without attempting to settle the truth of development or even consider its essence at all—mode B puts the spotlight on the world-making capacities of development actors as well as the sometimes immense power of their practices and imaginative work. Think of the wizard, "the man behind the curtain,"[82] and also of the machine that goes of itself.

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81.   See Shihata, *supra* note 34 at 248.
82.   *The Wizard of Oz* (Metro-Goldwyn-Mayer, 1939) at 01:28:45.

III. "MAKING UP" THROUGH LAW

As we have seen, Hacking's schema provides a way to trace how states materialize as particular *types* of states—developing or underdeveloped—and, at a more granular level, how certain features of these states come to be seen as lacking or pathological or, by contrast, desirable and to be retained. It puts the spotlight on the technologies by which development aims are formulated and implemented, the tools by which progress is assessed, and the institutional processes through which particular figures emerge as subjects of interest that are either redemptive or problematic and accordingly subject to cultivation, elimination, reform, et cetera. Putting aside intractable disagreements over theory and goals in favour of a focus on practice, Hacking's schema makes visible and, in so doing, helps make sense of dimensions of development, including marked shifts in priorities and preoccupations over time that, although of pressing intellectual as well as practical interest, can otherwise be difficult to access or explain.

In this last Part, I want to propose that there may be other uses for Hacking's model, particularly in projects that engage claims about legal rights and the rule of law to advance their aims. Here, I focus on the practice of using human, constitutional, or basic rights within legal and political arenas to frame and either legitimate or delegitimate social, economic, and cultural arrangements and institutions and thereby advance, block, or modify proposals to transform them.

These contexts are of particular interest for a number of reasons.

First, claims made through and about law are pervasive within development policy and practice, as they are in the international order as a whole.[83] After Amartya Sen, rights themselves are understood to play a constitutive role in development; put otherwise, their presence is part of how development is now conventionally defined.[84] But, as Sen also argues, rights possess profound instrumental importance to development too. Thus, it has become not just common but *normal* to argue that successful social, cultural, and economic transformation depends upon legal, bureaucratic, and administrative reform. It is equally common to justify particular legal and institutional arrangements, and to resolve instances of competing or conflicting priorities, with reference to

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83.   See Rittich, "Second-Generation Reforms," *supra* note 35 at 203-205; Rittich, "Theorizing International Law and Development," *supra* note 65.

84.   See *e.g.* World Bank, *World Development Report, supra* note 10 at 102-106.

the normative weight of human, constitutional or basic rights.[85] As is the case with making up people, Hacking's modes A and B provide a window into the structure of these debates, a way to look behind the positions around rights and other forms of governance legalism.[86]

Hacking's contrasting modes also seem extraordinarily useful for tracking the path between the hopes that animate these deployments of legal rights and the complex, contested, and even perverse outcomes that have often been their result. Such outcomes are now so routine that they have generated debate not only about whether particular results should be judged as victories or defeats, but they have also provoked reflection on conceptions of freedom and justice that are advanced or impeded; the agency and subjectivity of claimants; and the distributive effects, symbolic and psychic as well as material, that have ensued.[87]

Second, the central place within development now accorded to legal rights has caused the individual rights holder, as distinct from the state or population, to materialize as an independently important figure within development policy and practice. Consider the incipient microentrepreneur, the promised result of the "legal empowerment of the poor,"[88] or the transnational commercial actor, whose putative demand for law undergirds the relentless calls to strengthen

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85. This is part of the juridification of politics that is characteristic of the postwar era. For a description and analysis of the general turn, see Kennedy, "Three Globalizations of Law," *supra* note 15 at 63-70; Duncan Kennedy, "A Political Economy of Contemporary Legality" in Poul F Kjaer, ed, *The Law of Political Economy: Transformation in the Function of Law* (Cambridge University Press, 2020) 89. See also Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2004).

86. Governance legalism is a term used to refer to engagements by social activists with regulatory, statutory, administrative, and bureaucratic structures and practices to advance their causes and projects. For a discussion, see Wendy Brown & Janet Halley, "Introduction" [Brown & Halley, "Introduction"] in Wendy Brown & Janet Halley, eds, *Left Legalism/Left Critique* (Duke University Press, 2002) 1 [Brown & Halley, *Left Legalism/Left Critique*]. For an in-depth investigation into feminist engagements with legalism, see Janet Halley et al, *Governance Feminism: An Introduction* (University of Minnesota Press, 2018) [Halley et al, *An Introduction*]; Janet Halley et al, eds, *Governance Feminism: Notes from the Field* (University of Minnesota Press, 2019) [Halley et al, *Notes from the Field*]. See also Karen Engle, Vasuki Nesiah & Dianne Otto, "Feminist Approaches to International Law," (University of Texas Public Law Research Paper No 716, 2021) in Jeffrey Dunoff & Mark Pollack, eds, *International Legal Theory: Foundations and Frontiers* (Cambridge University Press) [forthcoming], online: <dx.doi.org/10.2139/ssrn.3820771>.

87. See the essays contained in Brown & Halley, *Left Legalism/Left Critique*, *supra* note 86; Halley et al, *An Introduction*, *supra* note 86; Halley et al, *Notes from the Field*, *supra* note 86.

88. See Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone*, vol 1, UNDPOR, 2008, online (pdf): <www.un.org/ruleoflaw/files/Making_the_Law_Work_for_Everyone.pdf>.

canonical private law rights so as to create an "enabling environment" for private sector investment. How such figures emerge, what functions they serve within development projects, and what they simultaneously displace are surely questions of interest. After Hacking, it is unsafe to assume that they are simply natural features of the global development landscape.

Third, there appears to be a family relationship, and at points even a structural homology, between Hacking's two modes and contemporary engagements around social justice conducted in the language of legal rights. More precisely, mode A recalls the operation of rights claims in the conventional, liberal mode, tracking the argumentative structure typically employed in the litigation of human rights and constitutional or basic rights. It also, broadly speaking, describes the discursive techniques employed by non-governmental organizations (NGOs) and civil society groups when they mobilize the discourse of rights to catalyze or block legislative, regulatory, and administrative change. This form or frame, then, is "mainstream" in Hacking's sense: Both advocates and their opponents engage with it, accepting it as (part of) the terrain on which struggles over social justice are now fought. The style of inquiry suggested by Hacking under mode B, by contrast, gives us a way to explore the performative and constitutive dimensions of rights claiming—dimensions that are excluded or denied under mode A.[89] It also sets up the possibility of a genealogy of present legal norms and institutions, one that might reveal dissident histories and forms of knowledge, competing agendas that lost out, as well as disavowed continuities in practice.

When considering Hacking's two modes, we might consider in parallel the idea of legal consciousness, which is described by Duncan Kennedy as the conceptual frameworks and discursive tools through which legal practitioners make professionally legible, competent, and persuasive arguments.[90] As Kennedy indicates, it is sometimes possible to periodize the consciousness that organizes

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89.   In a series of recent papers, Andrew Lang distinguishes representational from performative modes of legal analysis, both of which form part of the critical tradition in law. Without taking a position on whether this distinction generally holds within critical thought, this analysis shares with Lang's desire to put the spotlight on the constitutive or world-making qualities of rights claims and the extent to which legal rules and practices themselves call into being and alter the entities that purportedly form their ground. See Andrew Lang, "Market Anti-naturalisms" in Justin Desautels-Stein & Christopher Tomlins, eds, *Searching for Contemporary Legal Thought* (Cambridge University Press, 2017) 312; Andrew Lang, "International lawyers and the study of expertise: representationalism and performativity" in Hirsch & Lang, *supra* note 37, 122.

90.   See *The Rise and Fall*, *supra* note 15 at 5. For a more recent analysis tracing a related phenomenon, the global circulation of legal thought, see Kennedy, "Three Globalizations of Law," *supra* note 15.

professional practice both within and across legal traditions.[91] At least in some cases, it is also possible to link the legal consciousness that prevails within a legal culture or tradition to patterns in the disposition of social and political conflicts. The unsettling and transformation of that consciousness may also presage, or directly reflect, challenges to the underlying political and economic order. Consider, for example, the revolution in legal theory and adjudicative practice precipitated by the Progressives and the Realists that accompanied the rise of the administrative state.[92] The consequentialist turn in legal thought and legal analysis was not simply a response to the convulsive transformation in American economic life at the turn of the last century and the redistribution of economic power that followed in its wake: It was driven by the powerful role played by conceptualist adjudicative practice in the constitution and legitimation of the (highly problematic) concentration of economic power itself.[93]

Although Kennedy's analysis is targeted at the legal consciousness that informs processes of adjudication and the conduct of its participating elites, its fundamental insight would seem to be more general. That is, practices across other domains that make claims about law might be examined for the consciousness that they inhabit and the sensibility that they exhibit concerning what law requires or permits. The exercise seems particularly worthwhile within development projects for some of the same reasons that it is a subject of interest when it comes to adjudication: Examination of the reigning legal consciousness provides a route to uncovering the technologies and practices by which important social, cultural, material, or symbolic stakes are disposed. In arenas beyond as well as within the court room, investigation of that consciousness may provide avenues by which to link legal discourse, practice, and technique to social and political transformation, revealing connections and relationships that are otherwise hard to make visible.

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91.   "Three Globalizations of Law," *supra* note 15.

92.   For a collection of key writings, see David Kennedy & William W Fisher III, eds, *The Canon of American Legal Thought* (Princeton University Press, 2006).

93.   See Morton J Horwitz, *The Transformation of American Law, 1870–1960*: *The Crisis of Legal Orthodoxy* (Oxford University Press, 1992); Kennedy, *The Rise and Fall*, *supra* note 15. As Kennedy describes, the mode of adjudication characteristic of the latter half of the nineteenth century in the United States, employed in the resolution of public, private, and public or private disputes, involved determining the boundaries between "powers absolute within their spheres" (*ibid* at 3). This mode of adjudication provided a degree of legal validation of laissez-faire economics, which in turn supported the unprecedented expansion and consolidation of corporate power in that era. A challenge to this mode of adjudication, along with the seeds of a future, significantly transformed legal consciousness and can be detected in the dissenting opinion of Justice Holmes in the famous case of *Lochner v New York*, 198 US 45 (1905) at 74-76.

Here, I attempt to sketch this possible relationship, using Hacking's contrasting styles of engagement, to consider rights claims advanced in the name of women's human rights and gender equality. The choice is driven by how widely gender equality norms circulate on the international plane; how pervasively, in the wake of gender mainstreaming, those norms now inform development policy and practice; and how routinely they continue to generate controversy, nonetheless. Rather than thinking of modes A and B as fully worked through examples of what is at stake in inhabiting different modes of legal consciousness, think of them as a means of contrasting different legal and political imaginaries that inform the uses of legal rights, while suggesting the strategies, responses, and inquiries that they might alternatively enable or block.

Consider the following claim, in Mode A:

> Women's rights are human rights. As human rights, women's rights are universal.

This claim is often followed by an assertion about something that unites all women or that, because of its signal importance, warrants priority or attention:

> The most pervasive violation of females is violence against women in all its manifestations, from wife battery, incest, and rape, to dowry deaths, genital mutilation, and female sexual slavery.[94]

Or:

> Despite differences in history and culture, feminists from all worlds share a central concern: their domination by men.[95]

Next follows the solution:

> Thus, respect for women's dignity and equality everywhere requires the implementation of X (a rule or policy criminalizing violence against women, for example).[96]

Claims might even be articulated in a way that anticipates a negative or competing response and attempts to block it, as in:

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94.   Charlotte Bunch, "Women's Rights as Human Rights: Toward a Re-Vision of Human Rights" (1990) 12 Hum Rts Q 486 at 489.
95.   Hilary Charlesworth, Christine Chinkin & Shelley Wright, "Feminist Approaches to International Law" (1991) 85 Am J Intl L 613 at 621.
96.   See, for example, the foundational article by Charlotte Bunch, where the general argument for recognition of women's human rights quickly slides into a litany of the forms of physical and sexual violence visited on women. *Supra* note 94.

> The dignity of my group depends on [fill in the name of any law reform effort undertaken to address group-based stigma]; questioning the premises of that law reform effort re-inflicts the stigma.[97]

As a discursive structure, mode A tends to elicit responses of the "yes, that is right" or "no, that is wrong" type.[98] Thus, a classic rejoinder might go as follows:

> Women's rights are culturally relative and specific. Your "women's rights" prioritize the Kantian individual and Western hedonic ideas of freedom, but there are other political moralities.[99] Our culture prioritizes communitarianism and collective rights.

Or:

> "[W]omen's inherent dignity [is] divinely ordained,"[100] or equality in our (Catholic or Islamic) nation mandates "separate but equal" social roles.[101]

Yet another rejoinder might go like this:

> For women in the Global South, the priority is economic security. Progress for women in our country is inseparable from decolonization and self-determination.[102] Thus, ensuring equality for women requires Y (reform to fundamental economic or political arrangements, or even a new international economic order).

Notice the narrowing of focus that occurs at each stage, as social conflicts are translated into legal form and claims are crystallized in anticipation of litigation or political contestation. The general mode of proceeding is from grand, abstract claim to specific harm or target, and then from identified harm or target to defined remedy, such as a specified law reform or enforcement strategy.

Yet driving the move from abstract or general to more specific, at each stage, are investments, explicit or implicit, in foundational matters of political philosophy as well as the sources of gender discrimination and their connection to other axes of social differentiation like race and sexuality, the relationship of gender to political economy and culture, and the embeddedness of gender in

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97. Brown & Halley, "Introduction," *supra* note 86 at 3 [square brackets in original].

98. Catherine MacKinnon's thought exercised a powerful effect on the style as well as the content of feminist rights-claims. For a detailed excavation of that thought, see Janet Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton University Press, 2006) [Halley, *Split Decisions*].

99. See Aihwa Ong, "Strategic Sisterhood or Sisters in Solidarity? Questions of Communitarianism and Citizenship in Asia" (1996) 4 Ind J Global Leg Stud 107.

100. Valentine M Moghadam, "The Fourth World Conference on Women: Dissension and Consensus" (1996) 3 Indian J Gender Studies 93 at 97.

101. Ong, *supra* note 99 at 113.

102. See Kumari Jayawardena, *Feminism and Nationalism in the Third World* (Zed Books, 1986).

structures of colonialism and imperialism. Attachment to these investments and belief in their explanatory power varies enormously, even among those committed to the project of gender equality. Thus, the move from highly general to more specific can, and in practice does, take a virtually limitless number of paths.

It is hard not to notice how fruitless, even pointless, it is to engage in debate conducted in the language of universals and absolutes in the face of such differences. Categorical assertions are made about the nature and sources of male dominance and female subordination. Inferences are drawn and lines of causation sketched out; positions are then defended or refuted—but on the basis of completely different premises. Warring visions of feminist political utopia and contending ideas about the nature of female subjectivity and the relevant normative authorities concerning gender roles are not the sort of differences that are easily bridged or overcome, however. We know how this will go: Such encounters will provide either a theatre for the staging of difference or, through consensus moves like the recognition of "culturally relative universalism," a means by which dominant (usually liberal) visions defeat other political agendas and imaginaries.[103]

Even making sense of the performance, however, seems to require a fundamentally different type of inquiry. For example, in the midst of contestation over fundamental goals and strategies, how *does* one position become dominant or "mainstream"? To get at these questions, we might try something else in mode B that brings the role of institutions, experts, knowledge, and practice more clearly into the picture.

Consider the recent itinerary of gender equality in the international order. Prior to the Vienna Conference on Human Rights in 1993 and the Fourth World Conference for Women in Beijing in 1995, a small group of New York-based feminists lobbied both United States officials and the official delegations of the United Nations member states to advance the cause of gender equality. Their primary strategy was the promotion of women's rights as human rights.[104] They further sought to identify violence against women (VAW) and its criminalization as the centerpiece of the global agenda to advance gender equality.[105] These women

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103. Karen Engle, "Feminist Governance and International Law: From Liberal to Carceral Feminism" in Halley et al, *Notes from the Field*, *supra* note 86, 3.

104. See Dianne Otto, "A Post-Beijing Reflection on the Limitations and Potential of Human Rights Discourse for Women" [Otto, "Post-Beijing Reflection"] in Kelly D Askin & Dorean M Koenig, eds, *Women and International Human Rights Law*, vol 1 (Transnational, 1999) 115.

105. See Rhonda Copelon, "Recognizing the Egregious in the Everyday: Domestic Violence as Torture" (1994) 25 Colum HRLR 291.

argued both that VAW should be understood as a violation of human rights and that human rights were the mechanism by which the agenda for gender equality as a whole should be advanced.

Both prongs of this agenda were largely accepted in Vienna.[106] Yet events shortly afterward, at the Beijing conference and the parallel NGO forum, soon disclosed the continuation of powerful contending agendas. As they had at least as early as the Nairobi conference, activists and scholars from the Global South insisted on the salience of race and class to questions of feminism.[107] They sought to foreground questions of development and political economy to the fate of women as well as the communities in which they lived.[108] Some suggested that if there was one issue around which women at Beijing might plausibly have organized, the best candidate may well have been the economic crisis.[109] Others insisted on the entanglement of gender questions with colonialism and capitalism and the inseparability of equality for women from the fate of both Western imperialism and national struggles for self-determination.[110] To complicate things further, many women organizing under "issue" caucuses identified not as women *simpliciter* but as lesbian women or Indigenous women, for example. All of these interventions frustrated the effort to identify any single, unifying harm experienced by women and adopt a common strategy to advance gender equality.

As it turned out, none of these contending positions gained significant traction within the official documents and narratives that emerged from Beijing. Women's rights and VAW, along with the attention to the gendered effects of macroeconomic decisions, were all ultimately listed in the twelve critical areas of concern in the Beijing Platform and its follow-up, as part of the expanding list of requirements and threats to gender equality whose periodic identification and

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106. See Engle, Nesiah & Otto, *supra* note 86.

107. See Otto, "Post-Beijing Reflection," *supra* note 104.

108. See *ibid*; L Amede Obiora, "Feminism, Globalization, and Culture: After Beijing" (1997) 4 Ind J Global Leg Stud 355; Ong, *supra* note 99.

109. See Bina Agarwal, "From Mexico 1975 to Beijing 1995" (1996) 3 Indian J Gender Studies 87.

110. See Ong, *supra* note 99. For a general statement of the state of the feminist encounter around that time, see Chandra Talpade Mohanty, "Cartographies of Struggle: Third World Women and the Politics of Feminism" in Chandra Talpade Mohanty, Ann Russo & Lourdes Torres, eds, *Third World Women and the Politics of Feminism* (Indiana University Press, 1991).

recitation had already become established international protocol.[111] But VAW soon leaped up to the top of the international agenda, fueled by developments elsewhere, such as the birth of the International Criminal Court,[112] while concerns about colonialism and capitalism and their legacies were left aside.

Although gender equality was soon "mainstreamed" across international institutions,[113] the subject at its centre fragmented at virtually the same time, taking forms quite different than those anticipated by the original proponents of gender equality. Among the figures who emerged was one who operated within, rather than against, the fiscal, policy, and regulatory parameters that feminists had identified as problematic at Beijing.[114] This empowered female entrepreneur made her first appearance in the Beijing Platform for Action.[115] However, she took full flight in the imagination of development technocrats as the World Bank responded to the normative challenge to its structural adjustment programs— mounted in Beijing in the name of women's rights—by reconfiguring the woman at its centre. No longer disadvantaged by the liberalizing reforms that facilitated global market integration, *this* woman was both the engine of economic growth and its primary beneficiary.[116] Rather than the panoply of special rights, entitlements, and protections, set out in the Beijing Platform and other public international law documents and treaties on gender equality, moreover, *her* legal requirements closely tracked those of other commercial actors.[117] While

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111. See *Report of the Fourth World Conference on Women, Beijing, 4-15 September 1995*, UNGAOR, 1996, UN Doc A/CONF.177/20/Rev.1 (1996) 7 at para 44, online: <digitallibrary.un.org/record/250039>; *Further actions and initiatives to implement the Beijing Declaration and Platform for Action*, GA Res S-23/3, UNGAOR, 23rd Special Sess, UN Doc A/Res/A-23/3 (2000), online: <digitallibrary.un.org/record/415893>.

112. See Karen Engle, *The Grip of Sexual Violence in Conflict: Feminist Interventions in International Law* (Stanford University Press, 2020).

113. See *e.g.* Andrew D Mason & Elizabeth M King, *Engendering Development: Through Gender Equality in Rights, Resources, and Voice* (World Bank & Oxford University Press, 2001), online (pdf): <documents1.worldbank.org/curated/en/512911468327401785/pdf/ multi-page.pdf>; *Further initiatives for social development*, GA Res S-24/2, UNGAOR, 24th Sess, UN Doc A/Res/S-24/2 (2000), online: <www.un-documents.net/s24r2.htm>.

114. See Kerry Rittich, "Engendering Development/Marketing Equality" (2003) 67 Alb L Rev 575 [Rittich, "Engendering Development"].

115. See Dianne Otto, "Holding Up Half the Sky, but for Whose Benefit? A Critical Analysis of the Fourth World Conference on Women" (1996) 6 Austl Fem LJ 7.

116. See Mason & King, *supra* note 113; Rittich, "Engendering Development," *supra* note 114.

117. See World Bank, *World Development Report 2012: Gender Equality and Development* (World Bank, 2011), online: <openknowledge.worldbank.org/handle/10986/4391>. Some of these diverging conceptions and legal requirements of gender equality are discussed in Kerry Rittich, "Out in the World: Multilevel Governance for Gender Equality" in Ashleigh Barnes, ed, *Feminisms of Discontent: Global Contestations* (Oxford: Oxford University Press, 2015) 44.

marginal at first, she has proved to be both durable and increasingly attractive—you can now find versions of her across the international order, legitimating initiatives from financial inclusion and the extension of microcredit to the legal empowerment of the poor.

A parallel story at the domestic level concerning the path of gender equality at work might go something like the following: Sexual harassment began to be recognized as a distinct phenomenon around 1979, when Catharine MacKinnon made the argument that behaviours long tolerated at work constituted harm to women that should be recognized under the rubric of sex discrimination.[118] MacKinnon's characterization of the gender order underlying workplace harassment, as an expression of the sexualized dominance of men over women,[119] was contested by other feminists almost immediately.[120] Courts, for their part, initially had difficulty conceptualizing workplace harassment as a form of sex discrimination because not all women were subjected to it.[121] Nonetheless, MacKinnon's proposal slowly consolidated as discrimination claims based on harassment, launched under Title VII in the United States and analogous statutes in other countries, began to succeed.[122] Over time, as a result of an immense amount of discursive and representational work within legal and activist communities, such behaviour began to be generally accepted as a manifestation of gender inequality.

Simultaneously, out in the world, women began to describe what heretofore had been part of the ordinary landscape of work in quite new, even radically different, ways. We might even say that, in part as a result of the legislative recognition and judicial ratification of sexual harassment as a legal wrong, women began to experience themselves, their work, and their workplace relations differently. For example, they came to see "normal" workplace relations and interactions as suffused with illegitimate forms of gendered hierarchy, and some began to imagine themselves as victims of sexualized harm while simultaneously seeing their co-workers or superiors as perpetrators of discrimination or violence.

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118. See Catharine A MacKinnon, *Sexual Harassment of Working Women* (Yale University Press, 1979).

119. "Feminism, Marxism, Method and the State: An Agenda for Theory" (1982) 7 Signs 515; "Feminism, Marxism, Method and the State: Toward a Feminist Jurisprudence" (1983) 8 Signs 869.

120. For a discussion, see Halley, *Split Decisions*, *supra* note 98.

121. This view was considered and rejected by the Supreme Court of Canada. See *Janzen v Platy Enterprises Ltd*, [1989] 1 SCR 1252 at 1253-54 [*Janzen*].

122. See *Meritor Savings Bank, FSB v Vinson*, 106 S Ct 2399 (1986) (US); *Janzen*, *supra* note 121.

Such legal victories neither eliminated the behaviour now routinely described as harassment nor changed the gendered character of workplace relations, at least in any immediate way. (Any accounting of change—or stasis—in workplace behaviour would, in any event, need to take on board the many other social, economic, cultural, and industrial transformations simultaneously driving a pronounced feminization of work and altering gender roles and, by extension, the balance of power at home and at work.) As time went on, it became clear that the preferred solution—legal prohibitions with sanctions attached to workplace behaviour identified as harassment—could not be unequivocally associated with progress even where they *did* change behaviour in the workplace; to the contrary, some workers stood to be distinctly disadvantaged, and in ways that were difficult to defend.[123] Yet, however indirectly, the conceptual reframing arguably set up a moment in which some previously powerful, even untouchable, men lost power, position, and, sometimes, freedom due to workplace behaviour in which they had previously engaged with impunity. At a minimum, it catalyzed a wave of later events that would be unthinkable in its absence: Think of "#MeToo."[124]

To be clear, the point of proceeding in mode B is not to establish the authoritative account of the itinerary of gender equality, whether on the international plane or within any national context. There are other entirely plausible—indeed, compelling—ways to narrate these journeys, each of which would identify other salient developments and make connections with other people, events, and agendas. For example, when it comes to telling the international story, we might flag the convergence of feminist aims with security and anti-terror agendas.[125] Or, we might note the dramatic expansion of the gender equality agenda to include questions of same-sex equality.[126] While any account or periodization is at risk of seeming deficient from some standpoint or perspective, the aim is to unsettle and denaturalize present conjunctures and preoccupations, and to illustrate how much institutional practices frame what

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123. See Halley, *Split Decisions*, *supra* note 98 at 290-303 (discussing *Oncale v Sundowner Offshore Services, Inc*); *Oncale v Sundowner Offshore Services, Inc*, 118 S Ct 998 (1998) (US).

124. Making this link, see Ginia Bellafante, "Before #MeToo, There Was Catharine A. MacKinnon and Her Book 'Sexual Harassment of Working Women,'" *The New York Times* (19 March 2018), online: <www.nytimes.com/2018/03/19/books/review/metoo-workplace-sexual-harassment-catharine-mackinnon.html>. See also Catharine A MacKinnon, "#MeToo Has Done What the Law Could Not," *The New York Times* (4 February 2018), online: <www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html?action=click&module=RelatedCoverage&pgtype=Article&region=Footer>.

125. See Engle, Nesiah & Otto, *supra* note 86.

126. See Dianne Otto, ed, *Queering International Law: Possibilities, Alliances, Complicities, Risks* (Routledge, 2018).

is observed, build what is known, and steer what is done about the underlying subject itself: here, the promotion of gender equality.

Notice, however, the shift that occurs in the move from mode A to B, as with the inquiry into development, from "finding the (right) answer" or otherwise settling the truth about gender equality to asking how our understanding of gender equality unfolds in time and space and examining what expert interventions and professional practice do to cause it to come into view in the first place.[127] Notice also the complicated series of events that might occur between the assertion of a legal right, such as the right to be free from sexual harassment, and the transformation of social relations such as, here, gendered relations at work. In contrast to mode A, it is difficult under mode B to draw any simple line or causal chain between discursive or representational shift, legal intervention, and the ultimate outcome, whether success or failure. Indeed, under mode B, when and how to assess the outcomes of interventions to advance equality, and by what metrics, emerge as key questions for investigation.

At stake here is recognition of the full scope of the world-making that is performed through rights claims and other practices of legalism. Under mode A, "bringing in" the law and making a rights claim comes as a response to a problem with its roots in economy, society, culture, or perhaps politics. Hence the typical focus of inquiry: Is the law directed at the right target? Is it properly designed and implemented? Is the law enforced? What we are moved to notice under mode B, however, is how much the law—along with the activists, experts, and institutions who mobilize legal claims and arguments—figures not just in the solution to gender inequality but in the formulation, and continual reformulation, of the problem itself. For it is in the making of claims about gender equality, the enacting of those claims in legal forms and uptake, and their encoding in institutional practice over time that what we know as the "core" features and attributes of gender equality are consolidated, and the criteria by which their presence or absence is judged are both established and changed.

Following mode B allows us to explore still further possibilities. Perhaps no general concept of gender equality *existed* in advance of these efforts and events. The idea here is not simply the now familiar claim that gender equality is neither universally recognized nor respected, although that is doubtless true of liberal as well as non-liberal states and societies.[128] Rather, it is that it is difficult to

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127. See David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press, 2016).

128. See generally Carole Pateman, *The Disorder of Women: Democracy, Feminism and Political Theory* (Stanford University Press, 1989).

locate any trans-contextual concept of gender equality in circulation before the practice of identifying gender *inequality* as a global phenomenon, describing its varied forms, and delineating the requirements of its elimination became established in the international order. Arguably, no "global woman" pre-existed these engagements between international institutions and women on the outside either; put otherwise, gender did not yet exist on a global scale as a coherent and useful category of analysis,[129] nor did (most) women imagine themselves as joined together in a global community.

Rather, gender equality and the accompanying idea of a global "sisterhood" in gender *in*equality[130] are, in some very fundamental sense, creations of the invocations, institutions, and practices that brought them about. Whether she is the entrepreneurial woman of development or the victim of sexualized violence within armed conflict, what and who we "know" her to be are products of the world conferences on women, the many international institutions now populated with gender (and other) experts, the activities and processes that they have initiated, the facts and claims disseminated in their reports, and, of course, the success of those promoting narratives of gender equality in inscribing their redemptive visions in legal and institutional form. All have fashioned female subjects—iconic victims or triumphal agents of progress—and placed them at centre stage, whether for the purpose of repudiating past crimes and errors or generating support for utopian futures. Viewed from this angle, we can perhaps start to make sense of how fluid and contingent the organizing idea of gender equality proves to be, and how it is that gender images and ideals might themselves be transformed in the encounter with other global projects. For what becomes visible is a continuous process of invocation, concretization, challenge, critique, dissolution, and transformation; one in which different figures and activities, foregrounding diverse and contending human attributes and propensities, turn out to be the means by which the paths to gender equality are both (provisionally) stabilized and fundamentally remade.

As Hacking reminds us, the appearance of new figures—along with the transfiguration or devaluation of old ones—is to a purpose. Classification is a prelude to action or intervention, and it operates through the deployment of expertise. When forms of expertise are recognized and effectively mobilized, classification becomes productive: It changes or simply creates the group or

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129. See generally Joan W Scott, "Gender: A Useful Category of Historical Analysis" (1986) 91 Am Hist Rev 1053.

130. See Robin Morgan, ed, *Sisterhood is Global: The International Women's Movement Anthology* (Feminist Press, 1984).

sub-group, whether person, nation, or other entity, that is its object. This is the "looping effect" to which Hacking refers.[131]

IV. ANALYZING DEVELOPMENT FUTURES: VISIONS AND FIGURES

It is at this point that the two stories join, for these figures and processes turn out to be as much in view within development institutions as they are within those with jurisdiction over human rights and gender equality. Indeed, they can be found well beyond, as formerly discrete fields are increasingly interpenetrated.

Although current ideals around gender equality have debts to feminist imaginaries and interventions in public international law and human rights made in the name of women's rights, some of the characteristics and capacities now celebrated and promoted in the name of gender equality or, more commonly, women's "empowerment," owe as much or more to development models and practice. As we see in the myriad efforts to "empower the poor," the figure of the entrepreneur plays a central role at every level—individual, national, and global.

To return to the beginning, having rehearsed its possibilities, we can see that Hacking's schema gives us a way to unfold the processes by which development visions are put into practice, exposing the means by which authoritative facts and knowledge are built at the same time. It also provides a way to see how governance practices directed at populations and states might themselves support, or even independently generate, visions of development. Providing a way to look at the production of development knowledge from either end, it is a useful guide to perennial development questions: how institutions generate the projects that they do and how those projects relate to the deployment of expertise, the construction of knowledge, and the practices of critique and resistance.

The intuition that we may be able to put Hacking's schema to use to illuminate the figures that populate development projects and policies seems borne out as well. Whether that figure is the rights holder, the entrepreneur, or the state itself, vision and images play central roles throughout. But those figures and images appear in quite distinct roles and at different points in time, as both the source or origin of development projects and as the product or reflection of institutional practice.

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131. Hacking, "Looping effects," *supra* note 18.